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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Computer III Further Remand Proceedings:	)	CC Docket No. 95-20
Bell Operating Company	)	
Provision of Enhanced Services	)	
	)	
1998 Biennial Regulatory Review --	)	CC Docket No. 98-10
Review of Computer *III* and ONA	)	
Safeguards and Requirements	)	

INCOMPLETE REPLY COMMENT STATEMENTS FILED JOINTLY BY
ARTHUR EVANS, INDIVIDUALLY (PRO SE) AND
THE AD HOC COMMITTEE OF INDEPENDENT INFORMATION PROVIDERS

266 Jerico Turnpike, Suite F
Floral Park, New York, 11001
516-354-2255

April 23, 1998

EXHIBIT #1 p.3

CASES 93-C-0451 and 91-C-1249

Arthur Evans and the Ad Hoc Committee Of Independent Information Providers ("FILERS") herein jointly file these incomplete reply comment statements, subject to FILERS Emergency Motion For an Extension Of Time to Supplement Reply Comments. The Ad Hoc Committee Committee Of Independent Information Providers, is an informal organization of individuals (including Arthur Evans), and individuals which provide the public with one minute recorded news and information reports via subscription to Bell Atlantic's 976 prefixed Mass Announcement Network Service. (Public calls orginiating in the downstate New York Lata, to 976 news reports are tariffed in New York State, at a rate of 40¢, Currently, calls originating outside New York State are currently completed to the news reports broadcast over Bell Atlantic's 976 facilities, without compensation to AHCIIP's members and other 976 news providers ("NPs"). Note that in addition, to the COMMISSION's continued authority over interstate transport of traffic to this Bell Atlantic exchange dedicated to news and information, the COMMISSION also has juridiction over these 976 facilities utilized by 976 NPs for electronic publishing services, pursuant to the Telecommunications Act of 1996, and the still in effect Computer II and III regulations, (see the significant record of past complaints (made pursuant to the AT& T consent decreee), by 976 based news providers, in which Judge Harold Greene construed 976 NP's news services within the scope of electronic publishing, (see complaints of Phone Programs, Megaphone, et al).

POINT #1: BASED UPON THE SUBSTANTIAL RECORD OF PAST MISCONDUCT (POSSIBLY CONTINUING) BY BELL ATLANTIC against 976 based NPs, FILERS oppose in their entirety Bell Atlantic 's 3/27/98 comments and proposed modification of COMMISSION regulations, as they affect 976 NPs and competitive voice news and information services. FILERS herein incorporate herein incorporate by reference the May 29, 1997, Opinion 97-7, of the New York State Public Sevice Commission,("NYPSC"), in Case 93-c-0451, in which the NYPSC affirmed most of the Gross Negligence and Willful Misconduct findings contained in the 1/17/96 Recommended Decision Of Judge Frank Robinson, (see Exhibit #1, excerpts).

POINT #2: Based upon the past record of misconduct and the continuing failure of Bell Atlantic to comply with both COMMISSION and NYPSC orders to provide fundamental unbundling and number portability to 976 NPs, FILERS disagree with BELL SOUTH, other RBOC, and BELL ATLANTIC's objections to the future extension by the COMMISSION of rights as carriers to 976 NP's under Section 251.

POINT #3: Based upon the past record of misconduct, and continuing failure of Bell Atlantic to comply with both COMMISSION and NYPSC orders to provide fundamental unbundling and number portability to 976 NPs, FILERS disagree with BELL SOUTH's, other RBOC, and BELL ATLANTIC objections to the COMMISSION's adoption of regulations banning Bell Atlantic's Joint marketing of intralata voice information services.

Respectfully submitted,

Arthur Evans

EXHIBIT #1, P1

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

RECOMMENDED DECISION BY
ADMINISTRATIVE LAW JUDE FRANK S. ROBINSON

CASE 93-C-0451 - Proceeding on Motion of the Commission to Review Rates, Charges, Rules and Regulations of New York Telephone Company Affecting the Information Provisioning Industry.

CASE 91-C-1249 - Proceeding on Motion of the Commission Concerning Tariff Revisions to Delete Provisions Pertaining to Charging Interexchange Carriers For Calls to Certain Community Information Service Numbers.

NOTICE OF SCHEDULE FOR FILING EXCEPTIONS

(Issued January 17, 1997)

Attached is the Recommended Decision of Administrative Law Judge Frank S. Robinson in these proceedings, together with a copy of the Commission's rules governing the procedures to be followed. Briefs on exceptions will be due February 6, 1997 and briefs opposing exceptions will be due February 21, 1997.

JOHN C. CRARY
Secretary

based matters by small businesses and those with limited resources should not be deterred by the cost, especially where the harm has been long-sustained and covert. The IPs conclude that here, the interest of justice as well as the tariff's integrity dictate a remedy which takes account of the cost to the IPs of these proceedings.

BRN likewise seeks recovery of its cost of participating in this proceeding. BRN repeats the litany of misconduct allegations, and asserts that company misconduct has forced the IPs to spend hundreds of thousands of dollars to participate in these proceedings. BRN too invokes PSL §93, which it says provides for not only compensatory damages, where a telephone company breaches its duty, but also recovery of legal fees.

The company deems the IPs' requests unprecedented and baseless. It says PSL §93 permits recovery in court only, and cites a Commission holding that the law does not provide for reimbursement of legal costs.[1] The company also rejects the IPs' equitable arguments, saying it is not a rogue organization nor one that has ever acted capriciously concerning the IPs. Rather, it says, it dealt with an imperfect system; acted quickly, fairly and reasonably under the circumstances; and always acted with the best intentions to fulfill its tariff obligations to compensate the IPs.

VII. FINDINGS ON THE MAIN ISSUE

A. Introduction

I conclude, based upon the entire record, that New York Telephone Company has been guilty of gross negligence and willful misconduct.

My conclusions will be elaborated fully below, but their thrust may be summed up as follows:

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[1] Case 95-G-0336, Town and Village of Gouverneur against St. Lawrence Gas Co., Memorandum Approved As Recommended And So Ordered, issued May 7, 1996.

The company's long-term deception of both IPs and the Commission concerning its unauthorized Autrax call count adjustments was willful misconduct.

The company was seriously negligent in pushing ahead with the Ericsson cutover in one gulp, rather than phasing it in, which would have enabled it to deal more efficaciously with the problems and avert serious harm to IPs.

The unexpected troubles that did attend the cut-over show that the company's planning for it was inadequate.

Likewise inadequate was the company's handling of the troubles when they arose, further evidencing insufficient preparation.

These basic elements of the cutover picture, taken together, constituted gross negligence.

Furthermore, the company engaged in willful misconduct in striving to cover up its negligence and to defeat efforts to call it to account. This extended to willful misconduct in the company's litigation of this proceeding.

I also conclude that the IPs were in fact harmed by the improper, deceitful and grossly negligent way in which New York Telephone provided service to them.

B. Mr. Lobosco

I will address this subject in depth because of its unusual and sensitive nature.

1. Procedural Circumstances

At the outset, it is acknowledged that the company has not cross-examined Mr. Lobosco. But, lest it claim any denial of due process, I will recapitulate the circumstances, even though my ruling in the matter has already been upheld by the Commission on interlocutory appeal.

At New York Telephone's turn to cross-examine Mr. Lobosco, it requested a 30-day continuance to investigate his allegations of improprieties. While I did rule that Mr. Lobosco might be recalled for cross-examination on that subject, I

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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

OPINION NO. 97-7

CASE 93-C-0451 - Proceeding on Motion of the Commission to Review Rates, Charges, Rules and Regulations of New York Telephone Company Affecting the Information Provisioning Industry.

CASE 91-C-1249 - Proceeding on Motion of the Commission Concerning an Ordinary Tariff Filing of New York Telephone Company to Remove Tariff Language No Longer Required Which Referenced the Billing of Customers for Non-Access Charges Under the Telephone Company Exchange Service Tariffs for Calls to Certain Community Information Services.

OPINION AND ORDER CONCERNING COMPLAINTS

Issued and Effective: May 29, 1997

settlement of Case 90-C-1148[1] and that implementation of one of Judge Robinson's suggestions for curing the blocking problem would, in substance, amount to a modification of that settlement--without notice to numerous affected parties or opportunity for them to be heard. MCI also calls attention to Judge Robinson's observations concerning New York Telephone's agreement with MFS Intelenet concerning the handling of 976 traffic between a caller on one local exchange network and an IP on another network. MCI notes that while the Judge did not explicitly propose that the Commission adopt any billing and collection or compensation rules for internetwork calls, "neither . . . did [he] explicitly negative" such a proposal. MCI says the Commission should make no determination on these matters in this proceeding but should leave them instead to consensual negotiations among the affected parties.

The Ad Hoc Committee of Independent Information Providers (AHCIIP) argues that the recommended decision was generally excellent but that Judge Robinson violated AHCIIP's due process rights in various ways and that AHCIIP should be awarded a greater refund than as contemplated by the recommended decision. In particular, AHCIIP says it should receive a refund of all charges collected by New York Telephone during the Autrax era.

DISCUSSION

Although we agree with the Judge's findings and conclusions concerning New York Telephone's conduct in connection with the cutover of the Ericsson switch, we conclude that the question of an appropriate remedy must be left to the courts. The company's behavior vis-a-vis the IPs has indeed been

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[1] See Case 90-C-1148, Order Approving Settlement (issued August 7, 1992).

disgraceful, as fully explained in the Recommended Decision.[1] But Judge Robinson's proposed "refund" remedy amounts, in substance, to an award of damages, which we lack jurisdiction to make. The Autotas case,[2] cited by the Judge as support for his refund recommendation, is distinguishable because it involved refunds of monthly tariff charges for impaired service, whereas here, even though the same tariff provision is applicable, the only charges collected by New York Telephone (and thus the only charges that could be refunded) were those for unimpaired service--i.e., the per-call charges for completed calls. Also, in Autotas the Commission expressly rejected the sort of computation recommended by Judge Robinson here and instead required refunds of all charges for the entire period of impaired service. A partial refund at a judgmentally derived level that takes into account the extent of the harm suffered by the refund

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[1] See, in particular, the discussion at pp. 107-143 of the Recommended Decision. Contrary to New York Telephone's arguments that the Judge mischaracterized or exaggerated the evidence of gross negligence and deliberate misconduct, we believe that with only very limited exceptions, the picture he has painted accurately reflects what happened, both before and after the cutover, and fairly assigns responsibility for the post-cutover operating problems suffered by the IPs. We reserve judgment pending further review (see infra) on the Judge's findings--to which New York Telephone has excepted--that the company's sponsorship of its "call pumping" testimony was an abuse of the Commission's procedures and that the company "reneged" on a prior commitment when it refused to make the law firm report concerning Mr. Lobosco's allegations available to the parties. We also note that in discussing the remedy issue (an issue we do not reach), Judge Robinson mistakenly asserted that New York Telephone had failed to respond to a January 8, 1991 letter from staff concerning post-cutover problems. The company did respond to staff's letter; see Exhibit 17 (Attachment 14).

[2] See Case 28804, New York Telephone Company (Autotas Service); Opinion No. 86-3 (issued February 18, 1986); Opinion No. 86-3(A) (issued May 6, 1986); Opinion No. 86-3(B) (issued August 28, 1987).

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New York Telephone. Third, we agree with MCI's suggestion that we refrain from adopting any general rule or policy concerning intercarrier compensation or other terms of interconnection with respect to 976 traffic. As MCI argues, the terms of interconnection should be negotiated between and among carriers, at least in the first instance. Fourth, we reject AHCIIP's various claims that its due process rights were infringed. AHCIIP was indulged at every turn by the Judge, and its claims of procedural unfairness are without merit.

The Commission orders:

1. New York Telephone Company is found to have committed gross negligence and to have engaged in deliberate misconduct in connection with the September 1990 transfer of 976 service to the Ericsson switch.

2. The January 17, 1997 recommended decision of Administrative Law Judge Frank Robinson is adopted and made a part hereof to the extent it is consistent with the opinion and order. Exceptions to his recommended decision are granted to the extent explained above and are denied in all other respects.

3. Within 60 days from the date of this opinion and order, New York Telephone Company shall modify the Ericsson switch in the manner specified at pages 62-63 of the company's brief on exceptions.

4. Within 90 days from the date of this opinion and order, New York Telephone Company shall file revisions to its Tariff P.S.C No. 900 to unbundle the rates for Mass Announcement Service as specified in this opinion and order and to eliminate from the revenue requirement underlying the rates so unbundled any amounts over and above the actual cost of providing such service. The revised material shall be filed on not less than 30 days' notice and shall not become effective until approved by the Commission.

5. Within 90 days from the date of this opinion and order, New York Telephone shall file a report concerning the

CERTIFICATE OF SERVICE

I Arthur Evans, do certify that on April 23, 1998, that a copy of both the Incomplete Reply Comment-Statements and the Emergencfy Motion For An Extention Of Time To Supplement Reply Comments of joint filers Arthur Evans and the Ad Hoc Committee of Independent Information Providers were deposited in the U.S. Mail, first class, postage prepaid to the persons on the attached service list. In addition, I Arthur Evans, do certify that I have this day made best efforts to notify orally by telephone both COMMISSION staff personnel and all active parties serving initial comments in this proceeding phase of my filing of an Emergency Motion For Extension Of Time.

Arthur Evans by Robert J. Aldrich

Arthur Evans

Frank W. Krogh
Donald J. Elardo
MCI
1801 Pennsylvania Avenue, NW
Washington, DC 20006

Daniel L. Brenner
Neal M. Goldberg
David L. Nicoll
NCTA
1724 Massachusetts Ave., NW
Washington, DC 20036

John F. Sturm
Newspaper Assn. of America
529 14th Street, NW
Washington, DC 20045

Campbell L. Ayling
William J. Balcerski
NYNEX
1111 Westchester Avenue
White Plains, NY 10604

Robert J. Butler
Wiley, Rein & Fielding
1776 K Street, NW
Washington, DC 20006

Robert B. McKenna
U S WEST
1020 19th Street, NW
Suite 700
Washington, DC 20036

International Transcription Service
1231-20th Street, NW
Washington, DC 20036

Howard J. Symons
Donna N. Lampert
Sara F. Seidman
Mintz, Levin, Cohn, Ferris...
701 Pennsylvania Ave., NW-Suite 900
Washington, DC 20004

Mary E. Burgess
NYDPS
Three Empire State Plaza
Albany, NY 12223

Richard E. Wiley
Michael Yourshaw
Steven A. Augustino
Wiley, Rein & Fielding
1776 K Street, NW
Washington, DC 20006

Gina Harrison
Pacific Telesis
1275 Pennsylvania Avenue, NW
Suite 400
Washington, DC 20004

Robert M. Lynch
Durward D. Dupre
Michael J. Zpevak
SWB
One Bell Center - Suite 3520
St. Louis, MO 63101

Lynda L. Dorr
PSC of Wisconsin
610 North Whitney Way
P.O. Box 7854
Madison, WI 53707

ALL OTHER PARTIES NOT LISTED ABOVE WHO FILED INITIAL COMMENTS

Peggy Reitzel
Federal Communications Commission
1919 M Street, NW
Room 544
Washington, DC 20554

James S. Blaszak
D.E. Boehling
Leving, Blaszak, Block & Boothby
1300 Connecticut Avenue, NW - Suite 500
Washington, DC 20036

Robert J. Butler
Paul C. Smith
Wiley, Rein & Fielding
1776 K Street, NW
Washington, DC 20006

M. Robert Sutherland
A. Kirven Gilbert III
BellSouth
675 W. Peachtree Street
Atlanta, GA 30375

Ronald L. Plesser
Julie A. Garcia
Mark J. O'Connor
Piper & Marbury
1200 19th Street, NW - 7th Floor
Washington, DC 20036

C. Donald Berteau
GeoNet Limited, L.P.
3339 Cardinal Drive
Suite 200
Vero Beach, FL 32963

Joseph P. Markoski
Jonathan Jacob Nadler
Jeffrey A. Campbell
Squire, Sanders & Dempsey
1201 Pennsylvania Ave., NW - Box 407
Washington, DC 20044

Mark C. Rosenblum
John J. Langhauser
Clifford K. Williams
AT&T
295 N. Maple Avenue - Room 3244J1
Basking Ridge, NJ 07920

Frank Michael Panek
Ameritech
2000 W. Ameritech Center Drive
Room 4H84
Hoffman Estates, IL 60196

Michael Glover
Lawrence Katz
Bell Atlantic Telcos.
1320 North Court House Road
Eighth Floor
Arlington, VA 22201

Edward R. Wholl
Carlos J. Sandoval
NYNEX
120 Bloomingdale Road
White Plans, NY 10605

Randolph J. May
Brian T. Ashby
Sutherland, Asbill & Brennan
1275 Pennsylvania Avenue, NW
Washington, DC 20004

Albert Shuldiner
Information Industry Assn.
555 New Jersey Avenue, NW
Suite 800
Washington, DC 20001

Peter A. Rohrbach
Linda L. Oliver
Hogan & Hartson
555 13th Street, NW
Washington, DC 20005